

Volume 1-B -- REDACTED TRANSCRIPT

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

S. VICTOR WHITMILL, )  
 )  
Plaintiff, )  
 )  
v. )No. 4:11-CV-00752 CDP  
 )  
WARNER BROS. )  
ENTERTAINMENT, INC., )  
 )  
Defendant. )

PRELIMINARY INJUNCTION HEARING

BEFORE THE HONORABLE CATHERINE D. PERRY  
UNITED STATES DISTRICT JUDGE

**\*\*REDACTED TRANSCRIPT\*\***

MAY 23, 2011

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1 (PROCEEDINGS STARTED AT 3:30 P.M.)

2 THE COURT: You may proceed.

3 MR. SPERLING: Thank you, Judge. Warner Bros. calls  
4 as its first witness, Mr. Dan Fellman.

5 THE COURT: All right, sir. Would you step right up  
6 here to the clerk to be sworn.

7 DAN FELLMAN,  
8 Having Been First Duly Sworn, Was Examined and Testified As  
9 Follows:

10 DIRECT EXAMINATION

11 BY MR. SPERLING:

12 Q Please state your full name for the record.

13 A Dan Fellman.

14 Q By whom are you employed and what is your position?

15 A I'm the president of domestic distribution for Warner  
16 Bros. Pictures.

17 Q So I'd appreciate it if you'd explain to the Court your  
18 job history and your responsibilities.

19 A I've been president of the division for the last 12  
20 years. I've been an employee for Warner Bros. for 33 years.  
21 My primary responsibility is to set the release dates and the  
22 release pattern for the motion pictures that we produce  
23 annually.

24 Q So over the course of your 33 years, how many theatrical  
25 releases have you been involved in at Warner Bros.?

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1 A I have worked on over 700 films for Warner, releasing  
2 them at all times of the year and all genres of film.

3 Q Earlier in your life, did you have experience as a motion  
4 picture exhibiter as well?

5 A Yes, I did.

6 Q Would you explain that?

7 A Prior to coming to Warner, I was president of American  
8 Theater Management. I owned theaters and managed theaters as  
9 well.

10 Q For how many years did you do that?

11 A Approximately ten.

12 Q Please describe your responsibilities for the original  
13 HANGOVER movie and for THE HANGOVER 2?

14 A I was responsible for setting the distribution date, the  
15 release date, and contracting exhibitors across North America  
16 to play the movie.

17 Q So turning to the THE HANGOVER 2, when was the release  
18 date announced?

19 A I actually announced the release date for THE HANGOVER 2  
20 on the 30th of July, 2009, approximately two years prior to  
21 the opening.

22 Q Is that unusual?

23 A It is unusual with the exception of what we call tentpole  
24 movies, movies that have such demand built in that you really  
25 are sending a signal out to the rest of the industry that we

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1 are planning the tentpole on that date and we are going to  
2 make that date and everyone else should clear out.

3 Q So what are the dates for the release and distribution of  
4 THE HANGOVER 2?

5 A Well, THE HANGOVER 2 is set to open on Thursday in 3,600  
6 theaters across North America representing over 7,200 screens.

7 Q Now how many tickets have been sold?

8 A Tickets began selling approximately three weeks ago, and  
9 they have been quite brisk.

10 Q Is the film also going to be released internationally?

11 A It will be re-released internationally in approximately  
12 2,000 theaters and a smaller number of countries fully to be  
13 released shortly thereafter.

14 Q What effect would the entry of an injunction of  
15 preventing the May 26th release date have?

16 A Well, it would be devastating for the movie, for our  
17 exhibiter partners, for our financial partners as well.

18 Q Let's start by looking at the performance of the original  
19 HANGOVER film. How did that film perform at the box office?

20 A The original HANGOVER was the largest grossing R-rated  
21 comedy in the history of the motion picture business. It  
22 grossed \$277 million domestically and \$192 million  
23 internationally.

24 Q So how do expectations for HANGOVER 2 compare to the  
25 performance of the THE HANGOVER?

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1 A I expect HANGOVER 2 to more than double the opening  
2 weekend of the original HANGOVER. The original HANGOVER  
3 grossed \$45 million in its opening weekend. I expect HANGOVER  
4 2 to gross over \$100 million in its opening weekend.

5 Q What do you base those estimates on?

6 A Well, the original HANGOVER was basically directed  
7 towards a demo of young males and young females over the age  
8 of 17. The movie had such success and broadened the scope of  
9 its audience from probably 15 to 80. After that release, the  
10 DVD was so successful, we sold over 18 million copies. It was  
11 also played multiple times on cable television as well. So  
12 the pent-up demand to see the second one is much wider than  
13 the first one.

14 Q Has any surveying or tracking been done of the expected  
15 performance?

16 A Yes, we do tracking and surveying on all of our movies,  
17 and it indicates that this movie will open to the level that I  
18 expect or maybe even more. It's tracking on a similar level  
19 of movies like Twilight, the Dark Knight, Shrek, movies of  
20 that nature, big, big name movies.

21 Q Why was THE HANGOVER 2 scheduled for release on May 26th?

22 A I picked May because May is really the beginning of the  
23 summer. It is a great time to launch your film.

24 Approximately 75 percent of colleges are closed along with  
25 high schools. This gives me the opportunity to be one of the

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1 first major films in the summertime to secure a large number  
2 of prints before all the big summer movies open, and you have  
3 to remember that every day in the summer, midweek Monday  
4 through Thursday, is like a Saturday night for me.

5 Q Now if the film were prevented from opening on May 26th,  
6 what would be the first date that Warner Bros. could  
7 realistically plan to release it?

8 A It would be many, many months before I could actually  
9 come up with a date.

10 Q Why is that?

11 A Well, there are a number of reasons. Primarily, we have  
12 films of our own that have been contracted to play in the  
13 summertime, and there are many movies that have been  
14 contracted by exhibitors from other companies to play during  
15 the next few months. So for us to get in on a large scale  
16 basis would take a lot of work and a lot of manipulating on  
17 our part. It would be very, very difficult to do. The other  
18 thing that concerns me about moving it back is if you take a  
19 look at the top 25 grossing films in the motion picture  
20 history, you will find that almost half of them opened up in  
21 the May period. There is not one that opened up in August or  
22 the fall.

23 Q Now turning from the impact on Warner Bros. to the impact  
24 on the theaters that would exhibit the film, what impact would  
25 there be on theaters if they weren't able to begin showing the

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1 film on May 26th?

2 A Well, in my estimation, I would think that the theaters  
3 involved would lose approximately xxx xxxxxxxx in revenue and  
4 another xx xxxxxxxx in concession sales.

5 Q Let's look at St. Louis in particular. Do you know how  
6 many screens have contracted to show the movie?

7 A In the Greater St. Louis area, we will open in 75  
8 screens.

9 Q Now why couldn't these theaters simply replace HANGOVER 2  
10 with another film?

11 A HANGOVER is such a major movie when it was announced two  
12 years ago that most of our competitors ran for the hills.  
13 They just didn't put an important movie in that date in  
14 competition to us. The only film that is available on the  
15 26th of May is Kung Fu Panda, quite a different film and  
16 certainly counter programming to the HANGOVER. I don't know  
17 if Your Honor knows it's a G-rated movie as opposed to the  
18 R-rated movie that we have, and it would be impossible for  
19 those 7,000 theaters to replace a missing film like HANGOVER  
20 considering the fact that Kung Fu Panda is already booked and  
21 will be opening this Thursday.

22 Q Now if the film can't be shown in these theaters, what  
23 impact would it have on theater profitability?

24 A Well, theaters operate at a very thin margin. They have  
25 52 weeks a year to generate their profit. By losing a



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1 tentpole film in one of the most important holidays, Memorial<sup>9</sup>  
2 Day Weekend, that can't be reproduced. They would just take a  
3 loss, and it would certainly affect their bottom line year  
4 end.

5 Q Now apart from the direct impact on Warner Bros., if the  
6 theaters aren't able to show the movie as scheduled, would  
7 there be any adverse consequences to Warner Bros. as a result  
8 of the impact on these theaters?

9 A Well, I think most definitely. I think we'd be held  
10 responsible for our exhibitors, concerned that they had  
11 licensed the movie in good faith from us and we didn't  
12 deliver. So I think we'd be in -- certainly they would be  
13 looking to us to get whole for the loss of revenue.

14 Q What would be the effect of delaying the release of the  
15 film?

16 A The effect would be devastating. I can't imagine being  
17 able to account for all the dollars that would be lost. My  
18 biggest concern would be that of piracy.

19 Q So let's talk about that. Why are you concerned about  
20 piracy?

21 A Well, I have already shipped over 7,000 prints just in  
22 North America, and currently they are sitting on the floor of  
23 the projection booths in theaters waiting for the midnight  
24 shows this Wednesday, the day after tomorrow. If we were  
25 enjoined, I would have to -- I would have to have all those

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1 prints picked up and shipped back to the studio for security  
2 purposes. It's a virtual certainty that more than one of  
3 those prints would be delayed along the way. Some truck  
4 driver would stop or something would happen and we'd be  
5 pirated. The results would be devastating. We would lose  
6 hundreds of millions of dollars.

7 MR. SPERLING: Thank you. No further questions.

8 THE COURT: Cross examination, Mr. Gerber?

9 MR. GERBER: Thank you, Judge.

10 CROSS EXAMINATION

11 BY MR. GERBER:

12 Q Mr. Fellman, I might have misheard you. Did you say that  
13 the only other movie this coming weekend is Kung Fu Panda?

14 A The movie that will be opening is Kung Fu Panda.

15 Q But there are other movies that people can go see?

16 A There are other movies, yes.

17 Q I haven't had a chance to see Thor yet. I could go with  
18 my family to see Thor this weekend?

19 A You could.

20 Q So if -- are you telling us that if THE HANGOVER 2  
21 doesn't open this weekend, people won't go to the movies?

22 A No, I'm not saying that, but your question regarding  
23 Thor, Thor has already been licensed to theaters, so these are  
24 theaters that will have nothing to play, and Thor has been  
25 licensed so they can't buy Thor.

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1 Q But there might be some empty seats that they could fill  
2 in those showings?

3 A Not with Thor.

4 Q All of the --

5 A They'd be filling maybe the screen with Thor, but they'd  
6 have four or five screens in each multiplex that have been  
7 committed to play THE HANGOVER 2 that they have nothing to  
8 play, so they would have to scramble and fill them in with  
9 whatever they could, but nothing could replace the amount of  
10 revenue that we would generate by opening THE HANGOVER 2.

11 Q And you talked about the movie theaters having sold  
12 advanced tickets; correct?

13 A Correct.

14 Q And you said that they've been selling advanced tickets  
15 for about three weeks?

16 A Most of them have.

17 Q And that's for about as long as this lawsuit's been  
18 pending; correct?

19 A That's correct.

20 Q So were they selling advanced tickets before you were  
21 served with the complaint in this case on April 29th?

22 A I don't control when they begin selling tickets. That is  
23 not my business. That is the business of each theater. And  
24 so some of them sold tickets three weeks, some of them sold  
25 tickets two weeks from opening.

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1 Q But you didn't call any of them up or send notice to them  
2 and say be careful about selling advanced tickets in case  
3 we're found -- or we're enjoined from getting this to you?

4 A No, sir. My job is to generate the most revenue I can  
5 from my films, and so it didn't occur to me to interfere with  
6 that process.

7 Q And you're very successful at that job it seems to me,  
8 aren't you?

9 A I hope so.

10 Q Mr. Sperling mentioned that you guys are an enormous  
11 company. Is that how you would characterize Warner Bros.?

12 A We are a large company.

13 Q And you grossed nearly \$2 billion domestically last year?

14 A Correct.

15 Q And, in fact, that was only a slight diminishment from  
16 the \$2.13 billion you guys grossed domestically in the  
17 previous year?

18 A Those are domestic numbers, correct.

19 Q Right. You grossed much more -- or you grossed another  
20 additional amount from international sales and distribution?

21 A Correct.

22 Q So the gross revenues for Warner Bros. over the last  
23 several years have been substantially larger than \$1 billion a  
24 year, \$2 billion a year?

25 A Correct.

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1 Q In fact, for ten consecutive years, haven't you grossed  
2 over \$1 billion a year just domestically?  
3 A Absolutely.  
4 Q In addition to your tentpole films, you release a number  
5 of other films every year, don't you?  
6 A We do.  
7 Q And last year, six of your films opened in the number one  
8 position, didn't they?  
9 A That is correct.  
10 Q You talked about the concern for piracy of your film.  
11 A I did.  
12 Q And Mr. Sperling has characterized the pre-release copies  
13 of THE HANGOVER 2, he has likened it to the nuclear launch  
14 codes. Would you compare it to that?  
15 A I was not here when he made that statement. I don't know  
16 what context that was given in.  
17 Q But the pre-release copies of this movie, you guard very  
18 carefully?  
19 A Absolutely.  
20 Q Piracy is a major concern?  
21 A Definitely.  
22 Q You are incredibly concerned about controlling how and  
23 when you release your copyrighted material, don't you?  
24 A I do.  
25 Q When did you ship the copies of the pre-release movie to

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1 the theaters?

2 A We try to ship them as close to the release date as  
3 possible depending upon the location of the theaters, and we  
4 have depots in different parts of the country, but generally  
5 we make sure the prints are there at least two days prior to  
6 the opening.

7 Q So for 80 theaters, that would be today?

8 A Absolutely.

9 Q And for 3,000 some odd theaters, that would be tomorrow?

10 A No. All those prints we ship in bulk, so they went out  
11 already.

12 Q When did they go out?

13 A They started shipping actually last weekend.

14 Q Last weekend?

15 A This past Friday.

16 Q May 20th?

17 A Yes.

18 Q The day that you filed your answer in this case?

19 A I don't know when we filed our answer.

20 Q So but all of those copies that you shipped out were  
21 shipped out approximately three weeks after you were served  
22 with the complaint in this case?

23 A I don't know the dates of the complaints. That is not my  
24 responsibility. My responsibility is to get these movies  
25 opened, and that is the normal course of which we ship our

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1 prints.

2 Q And when did you become aware of this lawsuit?

3 A Not until a few weeks ago.

4 Q But you were aware of this lawsuit a few weeks ago?

5 A Yes.

6 Q And you were aware that Mr. Whitmill was seeking a  
7 preliminary injunction to stop the release of this film?

8 A Yes.

9 Q And you went ahead and shipped all those copies?

10 A My job is to open these movies, and if I did not move  
11 forward, I would not have prints waiting to open on Thursday,  
12 so I had to do what was my responsibility, and that is to move  
13 forward and get those prints out in the theater.

14 Q And Warner Bros. is an enormous company, and it needs to  
15 open its tentpole movies when it wants to open its tentpole  
16 movies?

17 A Every company opens their tentpole movies when they like  
18 to open them, yes.

19 Q In fact, the point of announcing the tentpole release two  
20 years ago was to get some room and say this is our big  
21 release, everybody step back, we're going to take this  
22 weekend?

23 A That is the concept of it, yes.

24 Q If you are enjoined from releasing this movie, do you  
25 know if any of your insurance policies would cover damages?

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1 A No, I'm not aware of that.

2 MR. GERBER: I have no further questions.

3 THE COURT: Any redirect?

4 MR. SPERLING: No, Your Honor.

5 THE COURT: You may step down. You may call your  
6 next witness.

7 MS. HEMERYCK: The next witness Warner Bros. would  
8 call is Sue Kroll.

9 THE COURT: Ms. Kroll, step up to the clerk to be  
10 sworn.

11 **SUE KROLL,**

12 **Having Been First Duly Sworn, Was Examined and Testified As**  
13 **Follows:**

14 DIRECT EXAMINATION

15 BY MS. HEMERYCK:

16 Q Ms. Kroll, could you please state your full name for the  
17 record.

18 A It's Sue Kroll.

19 Q And could you tell us who do you work for and what do you  
20 do?

21 A I work for Warner Bros. Pictures, and I'm president of  
22 worldwide marketing.

23 Q And how long have you been in that position?

24 A I've been in my current position for a little under 14  
25 years, and prior to that, I was the head of international



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1 marketing for about eight years.

2 Q And how long have you been employed by Warner Bros. or  
3 Warner Bros. affiliates?

4 A Since 1994.

5 Q Now let me ask you to keep your voice up just a little so  
6 I can hear. You are currently the president of Worldwide  
7 Marketing. Can you tell us what that job entails?

8 A Yes. Essentially, I figure out the strategy, selling  
9 strategy, for all of our theatrical releases and then work to  
10 develop the campaigns to support it. That would include all  
11 the artwork, promotional campaigns, publicity, doing research  
12 and design. Everything related to the release of our films.

13 Q And you said you've been with Warner Bros. since 1994.  
14 During that time, how many theatrical motion pictures have you  
15 been involved in marketing?

16 A Hundreds.

17 Q Now are you currently involved in marketing THE HANGOVER  
18 2?

19 A Yes, I am.

20 Q When is that scheduled to open?

21 A Thursday.

22 Q And what is the media budget for THE HANGOVER 2?

23 A The overall budget is about xxx xxxxxxxx.

24 Q And how much has Warner Bros. spent of that so far?

25 A As of Friday, we spent xx xxxxxxxx of that.

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1 Q And what is the current status of the marketing campaign?

2 A It's essentially done. It's complete. The film opens  
3 this week.

4 Q And when did Warner Bros. begin planning the media  
5 campaign for THE HANGOVER 2?

6 A Well, we started planning the overall campaign back a  
7 year ago.

8 Q And what sort of campaign did you plan? What were the  
9 elements of the campaign?

10 A Well early on, you start thinking about how you're going  
11 to advertise the film, how are you going to talk about it,  
12 when, where, you know, what kind of date you might have for  
13 materials, so that's what we were thinking about.

14 Q Now when was the first time -- let me back up. Now,  
15 Ms. Kroll, you have obviously seen images of the actor Ed  
16 Helms who plays Stu Price in the movie with the tattoo on his  
17 face; right?

18 A Yes.

19 Q When was the first time an image of Mr. Helms with that  
20 tattoo appeared in the media?

21 A The first appearance was late November.

22 Q And was that part of Warner Bros.'s campaign?

23 A That was not part of our campaign. That was a leak.

24 Q And what happened?

25 A The images were leaked onto TMZ onto their website. We

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1 don't know where they came from.

2 Q Were they picked up by other media outlets?

3 A Once you are online, things go viral. That is just the  
4 nature of the internet.

5 Q Did that happen in this case?

6 A It did.

7 Q Did these images go viral?

8 A It did.

9 Q Let's start talking about movie trailers.

10 A Okay.

11 Q When did Warner Bros.'s official campaign to promote the  
12 movie actually start?

13 A Well, our very first trailer, which was a teaser trailer,  
14 that went out the end of February. It was February 24th, and  
15 we debuted that on Apple.com and then it went into the  
16 theaters the next day.

17 Q And what is a teaser trailer? Tell me what that means.

18 A Well, normally for our films, especially if they are a  
19 film of this size, we will develop more than one trailer, and  
20 a teaser trailer is designed for very early placement out in  
21 the world to let consumers know that the film is coming, so it  
22 is essentially an announcement.

23 Q And did the teaser trailer in this case for THE HANGOVER  
24 2 include an image of Ed Helms with the tattoo on his face?

25 A It did.

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1 Q And was there a subsequent more complete trailer that was  
2 released?

3 A Yes.

4 Q When was that?

5 A That went out -- its first appearance was April 1st.

6 Q And about how many theaters has that trailer played in?

7 A Thousands. Like over 3,000.

8 Q And does Ed Helms appear in that trailer with the tattoo  
9 on his face?

10 A Oh, yes, he does.

11 Q Let's talk about television marketing.

12 A Okay.

13 Q I assume there's been television marketing for THE  
14 HANGOVER 2?

15 A Yes, a lot.

16 Q About how much has Warner Bros. spent on TV advertising?

17 A We've spent xxx xxxxxxxx.

18 Q And why is that?

19 A TV is essentially your most important media for promoting  
20 the film like THE HANGOVER 2.

21 Q When did TV ads start to run?

22 A We started the campaign mid April, and there was a lot of  
23 sports programming at the time, playoffs and so on.

24 Q And why does that matter?

25 A It is perfectly targeted to the audience for our film.

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1 The other thing about the timing, you know, we are very  
2 fortunate because a lot of the big programs on TV are coming  
3 to an end for the season, so we are also promoting a lot of  
4 season finales both on network television and on cable.

5 Q I want to turn now to the print component of the  
6 campaign.

7 A Okay.

8 Q What was the first kind of poster or print media with Ed  
9 Helms in it that you debuted?

10 A Well, we have developed a lot of artwork to support the  
11 film. The very first was a banner featuring Ed Helms as well  
12 as some of the other cast members that went out in theaters.

13 Q Was there one on Facebook?

14 A Yes, it did go on Facebook. That is where it debuted.  
15 There is a HANGOVER page on Facebook, and that is where people  
16 tend to go first for all the other information.

17 Q When did that poster debut on Facebook?

18 A That went out at the same time as our trailer, mid  
19 February.

20 Q And I want to talk a minute about the Facebook. So you  
21 said there is a HANGOVER page on Facebook?

22 A Yes.

23 Q Can someone be friends with THE HANGOVER?

24 A Yes. That is exactly what it is intended for, so people  
25 go on and they exchange their ideas and look at artwork and

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1 whatnot, everything related to THE HANGOVER.

2 Q How many friends on Facebook does THE HANGOVER have?

3 A We have 11 and a half million friends for the film THE  
4 HANGOVER.

5 Q You talked about a poster being on Facebook at some  
6 point.

7 A And then it went into theaters.

8 Q When was that?

9 A And that was in March. And then the entire -- so there  
10 were two phases for the campaign. So that artwork went, then  
11 it lead to individual character banners, and by April, all of  
12 the artwork was in theaters.

13 Q About how many theaters are displaying this artwork?

14 A Thousands and thousands of theaters.

15 Q Is there also an outdoor advertising campaign?

16 A Yes, very extensive outdoor campaign.

17 Q What does that include?

18 A That includes big outdoor billboards in certain markets,  
19 sides of buildings, bus shelters, bus sites.

20 Q And Ed Helms appears with the tattoo in those?

21 A Absolutely he does.

22 Q And when did the outdoor advertising start?

23 A Around the same time in April, beginning of April.

24 Q All right. If you could turn in your binder to tab I.

25 A Which tab?

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1 Q Tab I. That is Warner Bros. Exhibit I. Can you tell us  
2 what that is?

3 A This is our print ad campaign, so these are all our  
4 banners and sheets.

5 Q And does that exhibit show the dates on which this print  
6 ad campaign opened in various --

7 A Yes, it does.

8 Q And that is what you just testified about?

9 A Yes. Yes, it's all here.

10 Q Now we talked about Facebook. Is there more to the  
11 internet campaign for THE HANGOVER?

12 A Yes. The internet campaign is very extensive for the  
13 film, so not only do we debut artwork on Facebook, but we also  
14 have dedicated a website for THE HANGOVER 2. We also paid for  
15 advertising in broad based mainstream sites like Yahoo, AOL,  
16 those kinds of sites, movie sites, and we also had, you know,  
17 interactive activities and the like. We have had an extensive  
18 sustaining presence online for months.

19 Q Now we talked about advertising. Is publicity different  
20 from advertising?

21 A Yes, it is.

22 Q Does Warner Bros. have a publicity campaign for THE  
23 HANGOVER 2?

24 A Yes, very extensive.

25 Q Can you talk about that, describe that.

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1 A Okay. Well, you know, our advertising campaign is  
2 essentially paid advertising. Publicity is designed to garner  
3 editorial support out there in the world, you know, get  
4 photographs placed in magazines, our movie stars on covers,  
5 lots of editorial coverage as well as exposure on television,  
6 and so there is a very big effort that is underway to support  
7 the film.

8 Q Did Warner Bros. hold a press junket for THE HANGOVER 2?

9 A Yes. We just completed the press junket. It was last  
10 week. We flew in essentially over 200 journalists from all  
11 over the world. You put them in a room with each of your  
12 talent and your director, and they go back and broadcast in  
13 their local market and interview, also print journalists.

14 Q And why does Warner Bros. engage in this publicity  
15 campaign?

16 A Well, publicity is a huge market. It is a marketing  
17 strategy, a huge part of any film. It is designed to give  
18 more support for your campaign and more information about a  
19 film or movie star, whatever it might be.

20 Q Does it help to build anticipation for the film?

21 A Absolutely. It helps you build awareness.

22 Q Turn to Tab J in your binder there.

23 A Okay.

24 Q So that is what's been marked as Warner Bros. Exhibit J.  
25 Can you tell me what this is?



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1 A Okay. This is a domestic publicity timeline, key dates.

2 Q So what does that show? What does that list?

3 A This shows that essentially every day beginning in  
4 January, there was some publicity activity related to THE  
5 HANGOVER 2.

6 Q And so this is the kind of publicity that we were talking  
7 about a minute ago?

8 A Yes. It includes guest appearances, articles that were  
9 placed, photographs that appear that we may have placed, yes.

10 Q And how many single-spaced pages is this document?

11 A It's three or four. A little over three.

12 Q And does Warner Bros. also have any promotions involving  
13 third parties that promote the film?

14 A Yes, it does.

15 Q Specifically the one with 7-Eleven?

16 A Yes, it does.

17 Q And I want to ask you about something called the 7-Eleven  
18 Scavenger promotion. Do you know anything about that?

19 A Yeah, a little bit.

20 Q Tell me what you know about that.

21 A Well, Scavenger is a mobile application that you can  
22 download, and 7-Eleven took advantage of that. You play  
23 games, you interact with the program, and you are able to win  
24 prizes.

25 Q Did the 7-Eleven scavenger hunt include a prize that had

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1 to do with the tattoo?

2 A It did, two tattoos.

3 Q And tell me about those.

4 A Well again, this is their execution of the game, and  
5 there were two tattoos selected. One was the tattoo in  
6 question and a monkey tattoo as well.

7 Q And are these actual tattoos or what are they?

8 A No. You download them and they stay on your phone.

9 Q They are electronic?

10 A Yeah, they are electronic.

11 Q And how popular was it? What was the status or what  
12 happened with that?

13 A Well, it is interesting. It actually was not popular.  
14 Only 187 people actually downloaded the tattoo. In my  
15 estimation, it is just a failure of the program. There should  
16 be like our Facebook page, there is 11 and a half million  
17 people who access it. It was a very small group of people, so  
18 it was very short lived.

19 Q And has Warner Bros. done anything with respect to those  
20 downloaded tattoos?

21 A As soon as this transpired, the tattoo was changed over  
22 to a program, so it is just a logo now, so nobody actually has  
23 it. It is not in anyone's phone.

24 Q So because of electronic, you are able to exchange it?

25 A Yes. It doesn't even exist anymore for anybody.

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1 Q So we talked about advertising, promotions, publicity.

2 Has the film attracted a lot of interest among members of the  
3 public?

4 A It has.

5 Q How would you characterize it?

6 A Well, it's been incredible actually. We subscribe to a  
7 tracking service that measures the awareness and interest of  
8 the public. It works exactly in the same way as the Nielsen  
9 tracking. And we are currently tracking at the same level as  
10 a film like Pirates of the Caribbean, Twilight, Shrek,  
11 Transformers, very broad based films.

12 Q Is that unusual?

13 A It is. This is the most highly anticipated R-rated  
14 comedy of all time, and that is very unusual for a film like  
15 this to be tracking as a broad based film.

16 Q Those other films are not R-rated movies; they are more  
17 generally --

18 A Yeah, they are all audience films, essentially for males  
19 and females of all ages, family films as well, Shrek, so it's  
20 very anticipated.

21 Q Now how would an injunction against the movie opening on  
22 May 26th, the scheduled release date, affect the marketing  
23 effort that Warner Bros. has expended for THE HANGOVER 2?

24 A Can you say that again?

25 Q So if the movie is not able to open on time because of an

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1 injunction, how would that affect the marketing that Warner  
2 Bros. has done for the film?

3 A Well, it's almost unthinkable. You know, everybody knows  
4 it's coming. People have plans to see it. It's been promoted  
5 very heavily obviously in paid advertising, publicity, and so  
6 on, and I believe we would essentially have to remarket the  
7 film.

8 Q Assuming it would release at some point in the future?

9 A Correct, yes.

10 Q So would Warner Bros. have to remarket it through a new  
11 campaign, same expenditure of money?

12 A Yeah. I mean, you know, it depends on timing, the date.  
13 When you think about the, you know, thousands and thousands of  
14 pieces of material that are out there with the incorrect date  
15 or the television that's been running, every article that's  
16 been written, every internet site, all that would have to be  
17 changed out. It would need to be freshened. You have to  
18 remind people once again that the film is going to be in  
19 theaters and of the appropriate date.

20 Q You would essentially be starting all over again with a  
21 new release date?

22 A Yes. It is a very crowded environment out there. There  
23 are movies opening behind us every weekend.

24 Q What about the impact on the publicity efforts? Would  
25 Warner Bros. be able to duplicate the same three and a quarter

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1 single-spaced pages of publicity that it's been able to for  
2 THE HANGOVER 2 if it were delayed for months?

3 A Well, it would be difficult. These publicity campaigns  
4 are planned months and months in advance. And a lot of  
5 publications, you know, they plan six to eight months out.  
6 Now they've already given us their commitment. We have  
7 appeared on covers. We have been in these publications, so it  
8 is very likely that they have commitments for all the upcoming  
9 films throughout the summer or the rest of the year.  
10 Moreover, even if they wanted to promote us again and work  
11 with us, I mean, those commitments would probably be difficult  
12 for them to give us that kind of coverage, but also certain  
13 publications, it is of no value to them anymore. These  
14 stories have to run, so they are running a business as well.  
15 Why would they want to do the same thing again. It would be  
16 very tough to recreate.

17 Q And the press junket, would you do another press junket?

18 A Sure, you can invite people into a press junket and ask  
19 them, but the coverage would be pretty spare.

20 Q And what impact do you think that would have on the  
21 movie?

22 A Well certainly, you know, it would not be the most highly  
23 anticipated film. It would be tough for people to find.

24 Q Let's talk now about the first HANGOVER movie. Were you  
25 responsible for marketing that movie?

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1 A I was.

2 Q Was Mike Tyson featured in advertising for that movie?

3 A He was.

4 Q Why was that?

5 A It is very interesting when that happened. We went out,  
6 we tested the film, and the scene -- there is a scene in which  
7 Mike Tyson is standing there and he punches Zach Galifianakis.  
8 It was at the time our highest tested scene for the film, and  
9 subsequently as we were developing our television campaign, we  
10 took that moment and we cut television spots with it, and it  
11 also was the most memorable and highest tested scene in the  
12 majority of our TV, so he ended up being a huge part of our  
13 advertising for that film. He is in everything.

14 Q So using trailers?

15 A Trailers, TV, any print.

16 Q And about how many theaters did the trailers for the  
17 first HANGOVER movie show Mike Tyson?

18 A Again, it's thousands.

19 Q You mentioned that Mike Tyson was in some print  
20 advertising; correct?

21 A Yes, he was.

22 Q And this is in your book as Exhibit K.

23 A Okay. Yes, I see it.

24 Q So what is Defendant's Exhibit K?

25 A This is one of our character banners. We created a

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1 series for this film, all our main characters as well as the  
2 baby and the chicken and the tiger and Mike Tyson.

3 Q And this is the one with Mike Tyson?

4 A Yes.

5 Q Did it appear in theaters all over the country?

6 A Yes, everywhere.

7 MS. HEMERYCK: Thank you. No further questions.

8 THE COURT: Cross examination.

9 MR. GERBER: Thank you.

10 CROSS EXAMINATION

11 BY MR. GERBER:

12 Q So this is the most anticipated R-rated comedy of all  
13 time; correct?

14 A Yes.

15 Q But if there is a delay in opening the film, you have to  
16 start your advertising entirely from scratch?

17 A Yes. I'm assuming that this would not be happening.  
18 Months and months would go by before this would happen. Yes,  
19 we would.

20 Q How many months of a delay would it require before you  
21 had to start from scratch?

22 A You know, it's difficult to say. It is a very  
23 competitive summer, a lot of films, a lot of advertising out  
24 there. You know, people do need to be reminded when things  
25 are coming out.

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1 Q So is it important that the marketing push is timely with  
2 respect to the release of the movie?

3 A Yes, it is. I mean, there are different stages of it,  
4 but it's important that you are out there right before the  
5 film is opening a few weeks in advance.

6 Q You still have that binder there; correct?

7 A Yes, I do.

8 Q Exhibit J.

9 A Exhibit J. The time line?

10 Q Yes, please.

11 A Uh-huh.

12 Q I believe you testified that this reflects the publicity  
13 that you have had since the beginning of January; correct?

14 A Yes. It's key publicity activities.

15 Q So it's the important publicity; key being important?

16 A Yes, it is important.

17 Q And you said if we look at this, we'll see that from  
18 January 1 to the present, there's been a key publicity event  
19 almost every day?

20 A Yes. I mean, you know, this outlines, you know,  
21 appearances, when we supplied artwork, a number of different  
22 kinds of things related to publicity, but yes.

23 Q How many key publicity dates were there in January?

24 A There are four.

25 Q Okay. That wouldn't be every day in January though?



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1 A No.

2 Q How many key publicity dates are there in February?

3 A Seven.

4 Q So a few more but again not every day; correct?

5 A That is correct.

6 Q How many key publicity dates did you have in March?

7 A Eleven.

8 Q All right. Still we're not at every day yet, but it's  
9 increasing again. How many for April?

10 A There are nine.

11 Q And so for January, February, March, and April, the first  
12 four months of the year, you had those key publicity events,  
13 and they fill up the first page; is that correct?

14 A They do.

15 Q And then the next three pages are key publicity events  
16 that occurred or set to occur all after April 29th when you  
17 were served with this lawsuit; is that correct?

18 A That's right.

19 Q So just in the last three weeks, you had more publicity  
20 involved than you did in the first four months of this year;  
21 is that correct?

22 A Yes, that is correct.

23 Q So the publicity for this continued to build as you head  
24 towards the release date?

25 A Yes.

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1 Q Do you follow that same pattern with your advertising?

2 A Yes, we do.

3 Q So you start with a small amount of advertising and  
4 increase it as you come up to the release date of May 26th; is  
5 that correct?

6 A That's right.

7 Q I think you testified that with respect to the original  
8 HANGOVER movie, there was screening and testing of scenes to  
9 see which scenes were the most engaging of the audience. I  
10 may be mistaken what you were looking for in that.

11 A Yeah. It is not a testing of individual scenes. You  
12 test the cumulative, so you test the film, you test the entire  
13 30 second TV spot, the entire trailer, and then as part of  
14 what people respond to, they'll mention specific things. We  
15 ask them, we prompt them, what did you like, what did you find  
16 funny, and it is a way of assessing what works best.

17 Q And when you see strong responses to individual scenes,  
18 individual characters or elements, those are the things that  
19 you brought out to market to promote the film?

20 A It is part of the consideration, absolutely.

21 Q And that was why you chose to market and promote  
22 Mr. Tyson in connection with the original HANGOVER movie; is  
23 that correct?

24 A That is.

25 Q And was Mr. -- I believe you said Mr. Tyson's presence in

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1 the movie was heavily marketed; is that correct?

2 A It was prominently marketed.

3 Q I apologize, sorry. Prominently marketed?

4 A Yes, it was.

5 Q And that was because Mr. Tyson tested there was a strong  
6 response?

7 A People enjoyed watching him. He interacted with our main  
8 characters. He became a part of the campaign.

9 Q You are involved in promotional relationships with other  
10 parties like 7-Eleven?

11 A Yes, my division is.

12 Q And you are responsible for overseeing those  
13 relationships as the head of that division?

14 A I am.

15 Q And so you are aware of that promotional licensing  
16 arrangement between Warner Bros. and 7-Eleven for the THE  
17 HANGOVER 2?

18 A I am aware of the arrangement. I have not reviewed the  
19 contract, but I am absolutely aware of the arrangement, yes.

20 Q And do you know does Warner Bros.'s contracts for a  
21 promotional event like that require Warner Bros. to approve  
22 all of the intellectual property that's used in those  
23 promotions?

24 A So the artwork, the images that they present?

25 Q Right.

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1 A Yes, they are reviewed and approved.

2 Q And 7-Eleven wouldn't be allowed to use any of the  
3 artwork or promotional materials, images associated with the  
4 THE HANGOVER 2 unless Warner Bros. approves it?

5 A You know, I'm not familiar with all the specifics in the  
6 contract.

7 MS. HEMERYCK: Your Honor, I object. It calls for  
8 the witness to speculate.

9 THE COURT: I'll overrule it, but if you don't know,  
10 just say you don't know.

11 THE WITNESS: Yeah, I don't know specifically. I  
12 don't.

13 Q (By Mr. Gerber) But you are aware that the Scavenger  
14 application and association with its promotion included a  
15 tattoo icon badge of the tattoo from Mr. Tyson's face?

16 A Yes, I know.

17 Q And you stated that after this lawsuit was filed, that  
18 icon badge was removed from the production?

19 A It was.

20 Q The leak that you talked about.

21 A Yes.

22 Q Was that the first time that the image of the Stu  
23 character with the tattoo on his face made it to the public?

24 A Yes, it was.

25 Q That wasn't something that you planned as part of your

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1 marketing?

2 A No, it was not.

3 Q Was that frustrating to you that this would be leaked out  
4 prior to your marketing?

5 A Yeah.

6 Q Because as part of your marketing plan that you work on  
7 for a year in advance, you want to control how that  
8 information is released to the public?

9 A That is exactly right and how it looks.

10 Q Because the control over the artwork and images that you  
11 use are the utmost importance to you?

12 A Yes. And this image was also, you know, a shot of a  
13 shot, a production shot, and it didn't serve our purposes at  
14 all in terms of how we would present and market the film.

15 Q You wouldn't have presented or marketed the film using  
16 that image?

17 A No.

18 Q And you would prefer to control how an image like that is  
19 used? You would prefer for it not to have appeared?

20 A Yeah. It just -- yeah, it was inadvertent, and we would  
21 always prefer that.

22 Q When you were planning the marketing and promotion of the  
23 THE HANGOVER 2, did you do the same or similar screening and  
24 testing of the movie and of the trailers for response?

25 A We did, yes.

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1 Q And did you base your marketing decisions in part on  
2 those results?

3 A Yes, in part.

4 Q And are the images that are reflected in your print  
5 advertising a reflection of the value you attributed to those  
6 images based on that testing?

7 A No, not the print work. We don't test print.

8 Q You test trailers though?

9 A Yes, exactly, we test trailers and television spots.

10 Q That was going to be my next question. Do you base your  
11 trailers, what you decide to put in that, is that based on the  
12 value you attribute to those scenes from the testing?

13 A In part, yes.

14 Q And you said I believe the teaser trailer was important?

15 A Sure. It's important to tell people a film is coming,  
16 state your date.

17 Q But is the teaser trailer any more important than any of  
18 the other trailers?

19 A Well, the teaser trailer is your first introduction, your  
20 first managed introduction to the consumer, and it creates a  
21 lot of excitement. The follow-up campaign, the follow-up  
22 trailers, do a much better job of telling people what the  
23 story is and what the movie is about, so they are important  
24 for different reasons.

25 Q And the teaser trailer, did it have the images of Stu

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1 with the tattoo on the upper left portion of his face?

2 A Yes. The three main characters featured in the teaser  
3 are simply walking through the streets of Bangkok, and because  
4 it was on his face, it was featured, yes.

5 Q And then the follow-up trailers, did they all have images  
6 of Stu with the tattoo on the upper left portion of his face?

7 A Yes, they do.

8 Q Did you do any trailers that didn't include images of Stu  
9 with the tattoo in the upper left portion of his face?

10 A There were a couple of television spots that included  
11 some footage from the early part of the film. I mean, Stu  
12 appears in a very small portion of the film without that  
13 tattoo, so there were a couple spots, but the majority of the  
14 campaign takes place after they wake up in Bangkok.

15 Q The spots that didn't feature Stu with a tattoo, when  
16 were those released?

17 A They are all part of the media mix. They are out there  
18 now, and they have been out there part of the campaign.

19 Q For how long have those been out there?

20 A Since mid April or so. Probably -- I don't know  
21 specifically, but some were during the campaign time.

22 Q Would you mind turning to Exhibit I in the binder.

23 A Yes.

24 Q I think that you said that the dates on here reflect the  
25 beginning of the use of those materials in your marketing

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1 campaign; is that correct?

2 A It is.

3 Q So the Facebook debut was -- or the debut for this  
4 particular image in the upper left-hand corner of the first  
5 page of Exhibit I debuted in theaters on April 8th and on  
6 Facebook on March 28th?

7 A Yes.

8 Q By the way, how expensive is it to maintain a Facebook  
9 site for a movie such as this?

10 A You know, I don't know exactly how much it is. We have  
11 an ongoing relationship with Facebook.

12 Q Would it be xxxxxxxx xx xxxxxxxx?

13 A No, it wouldn't be that much.

14 Q Would it be xxxxxxxx xx xxxxxxxxxx xx xxxxxxxx?

15 A Yeah.

16 Q And then the middle set of images were beginning to be  
17 released on April 11th?

18 A Yes.

19 Q And then the larger banners all the way to the right were  
20 released on May 2nd after the lawsuit in this case was served  
21 on Warner Bros.?

22 A Yes.

23 Q On the second page, the in-theater hanging art.

24 A Yeah.

25 Q There are six separate images?



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1 A Yes.

2 Q There are six separate images there.

3 A Yes.

4 Q One of which has Stu with the tattoo on his face?

5 A Yes.

6 Q Do these six images represent some of the elements that  
7 you felt would be valuable in promoting and marketing the  
8 film?

9 A Yes.

10 Q The outdoor elements on the following page, it looks to  
11 me like all of those advertising pieces first appeared May 2nd  
12 after the filing of this lawsuit and Warner Bros. being  
13 served?

14 A Yes.

15 Q And the April 18th post date for the images on the next  
16 page for outdoor advertising for walls.

17 A Yes.

18 Q Do I read this correctly, the ones on the left side came  
19 out on April 18th in L.A. and the ones on the right in New  
20 York?

21 A That's correct.

22 Q None of that was in Missouri?

23 A That is correct.

24 Q This may be slightly off track, but how much of your  
25 promotional and marketing budget do you spend to advertise in

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1 Waynesville, Missouri?

2 A I don't know.

3 Q Any?

4 A Well, there is no outdoor in Missouri, okay? We don't  
5 have outdoor here. But all these same images are all over the  
6 theater and all over the internet and all over television, but  
7 there are certain markets that are outdoor markets.

8 Q Okay. But if you don't go to the theater and if you  
9 don't watch broadcast television or cable television, you are  
10 not going to see any of those advertisements, are you?

11 A No. I mean, they are online as well.

12 Q If you go to your Facebook page?

13 A Anywhere. They are all over. We just posted images on  
14 Facebook, but they are absolutely everywhere, all over the  
15 internet, all the major sites.

16 THE COURT: Are you going to go through all of those?

17 MR. SPERLING: I will ask just two more questions. I  
18 won't go through the rest. The Court can look at those.

19 Q (By Mr. Gerber) If I could ask one more question about  
20 these. I saw the movie a week ago, almost a week and a half  
21 ago, and none of the images that I see in your print  
22 advertising could I find in the movie. Are these stills from  
23 the movie?

24 A No. I mean, we have a photo shoot that we take during  
25 the film, and they are scenes that are designed for print

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1 work. So, in other words, the scene when they wake up in the  
2 hotel room in Bangkok, that is what you see here, but it has  
3 to be assembled in such a way that it could be used on a  
4 poster. But these are actually -- these are moments from the  
5 film executed for print.

6 Q For example, in this particular image --

7 A Yes.

8 Q This isn't a scene from the movie because they were  
9 actually never in the same room at this point in time.

10 A That's right. It is a setup shot that we did during the  
11 photo shoot.

12 Q And do you spend any effort in trying to figure out how  
13 to design and configure these shots?

14 A Oh, of course, effort and money.

15 Q Money goes into this. And I can see here the tattoo on  
16 the upper left of Mr. Helms's face.

17 A Yes.

18 Q If we look at a similar image here -- maybe I can zoom in  
19 a little bit more -- do you see the back of the monkey's  
20 jacket there? It's a little hard to see.

21 A Yeah.

22 Q You've seen the movie, haven't you? I saw pictures of  
23 you at the red carpet premier last week.

24 A Yes. I have seen it many times.

25 Q What image is on the back of the monkey's denim jacket in

1 the movie?

2 A This is the Rolling Stones.

3 Q Well, that is what is in the movie is that iconic image  
4 of the Rolling Stones with the mouth and the tongue.

5 A Yeah, I can't actually see what this is. It is very  
6 small.

7 Q All right. But this image, you can tell it doesn't have  
8 any of the red that the Rolling Stones logo would have. This  
9 image is actually something more like wings on the back of the  
10 jacket. It's not the Rolling Stones image. Why did you when  
11 you consciously chose how to frame and put this image together  
12 and have that tattoo front and center in the upper third did  
13 you change out the monkey's wardrobe?

14 A I can't answer that. I didn't personally change out the  
15 wardrobe.

16 Q But the jacket is a key piece in the film, isn't it?

17 A Well, I mean, everybody is wearing their clothes, I mean,  
18 it's part of his costume.

19 Q But for a plot device, the monkey has the code inside his  
20 pocket in the jacket. The jacket has to be the same from the  
21 beginning to the end or the plot doesn't hold up.

22 A Right.

23 Q And the monkey's jacket has the Rolling Stones logo on  
24 the back of it, but all of your conscious print advertising  
25 chose not to do that.

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1 A The role of advertising is not necessarily a literal  
2 interpretation of what you are seeing in the film. This is  
3 designed so that the images are conveyed in the best possible  
4 way. So this would have been set by a designer so it fits  
5 into the aspect ratio of what we are ultimately going to  
6 complete and sell on. I didn't make that decision.

7 Q Do you know if any of the insurance policies that Warner  
8 Bros. might carry would cover damages if you were enjoined in  
9 the suit?

10 A I don't have knowledge of that.

11 MR. GERBER: No further questions.

12 THE COURT: Redirect?

13 MS. HEMERYCK: No redirect, Your Honor.

14 THE COURT: You may step down. You all may proceed.

15 MR. SPERLING: Thank you. Warner Bros. calls as its  
16 next witness Chris Wheeler.

17 THE COURT: Mr. Sperling, I know you've been very  
18 brief with your witnesses, and I appreciate it. Is there any  
19 way to stipulate what these other witnesses will say? I'm  
20 trying to figure out if there is anything contested.

21 MR. SPERLING: This witness will be very short. This  
22 witness will be five minutes, Your Honor.

23 THE COURT: That is fine.

24 MR. SPERLING: And then just to advise the Court, the  
25 next witness will be less than 15 minutes, and then we would

1 like a very brief opportunity to address the Court on the  
2 plaintiff's motion not to have Professor Nimmer testify.

3 **CHRISTOPHER WHEELER,**  
4 **Having Been First Duly Sworn, Was Examined and Testified As**  
5 **Follows:**

6 MR. SPERLING: Judge, to try to make this more  
7 compact, perhaps after this witness, we can briefly confer  
8 with counsel for the plaintiff, and if we can stipulate to  
9 portions of the testimony, we will make it even more compact.

10 THE COURT: Okay. That is great. I appreciate it.

11 DIRECT EXAMINATION

12 BY MR. SPERLING:

13 Q Please state your full name for the record.

14 A Sure. My name is Christopher Matthew Wheeler.

15 Q Mr. Wheeler, what is your profession?

16 A I am an attorney.

17 Q Where are you licensed to practice?

18 A The state of California.

19 Q I'd appreciate it if you would describe for the Court  
20 your employment and your job responsibilities?

21 A Sure. I have my own law practice, and in addition to  
22 handling and assisting clients in a number of matters  
23 including general counsel, I also perform services for other  
24 attorneys on a contractual basis, and one of the other  
25 attorneys I perform services for is Mr. Kia Kamran.

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1 Mr. Kamran assigns a number of tasks to me from time to time.

2 Q Have you ever been asked to do any work in connection  
3 with Mike Tyson?

4 A Yes, I have.

5 Q When were you first asked to perform work for Mr. Tyson?

6 A I can't speak to an exact date, but within the past 12  
7 months, perhaps a little longer, maybe 18.

8 Q Have you done any work in connection with the trademark  
9 registration application of Mr. Tyson?

10 A Yes, I have.

11 Q Would you describe that?

12 A Sure. The trademark application, Mr. Kamran had  
13 contacted me, said that we needed to file an additional  
14 trademark application for Mr. Tyson. Mr. Kamran provided me  
15 with the different goods and services and different areas of  
16 commerce where the application was going to be filed in. He  
17 provided me with a copy of the mark, and I completed the  
18 trademark application as he had requested.

19 MR. SPERLING: May I approach the witness?

20 THE COURT: Sure.

21 Q (By Mr. Sperling) I'd like you to look at what has been  
22 marked as Warner Bros. Exhibit R. Do you recognize this?

23 A Yes, I do.

24 Q What is it?

25 A That is a drawing of the logo mark that I was instructed

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1 to register.

2 Q Please describe the work that you did in connection with  
3 the submission of the trademark registration application?

4 A After completing the application, I handed it -- or  
5 electronically sent it to Mr. Kamran for his final review and  
6 approval. He reviewed and approved it. He then affixed his  
7 electronic signature to the document, returned it to me with  
8 the instruction to file it. I then electronically filed it  
9 with the U.S. Patent and Trademark Office and paid the  
10 prescribed fee by credit card.

11 Q I would like you to look at what's been marked as Warner  
12 Bros. Exhibit G.

13 A I have it.

14 Q What is it?

15 A This would be a digital reproduction of the trademark  
16 application. There is no physical copy of the application any  
17 longer.

18 Q So this is the application that you prepared and filed?

19 A That is correct. It's entirely electronic.

20 Q After you filed the application, what happened next in  
21 connection with the application?

22 A We were contacted by the examining attorney.

23 Q And were you involved in that communication?

24 A No, I was not.

25 Q Do you know the contents of it?



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1 A Yes, I do.

2 Q Please describe.

3 A The examining attorney contacted Mr. Kamran and  
4 instructed us to change some of the description of goods and  
5 services for the purposes of clarification.

6 Q I'd like you to look at what's been marked as Warner  
7 Bros. Exhibit S.

8 A I am looking at it.

9 Q Can you describe what that is?

10 A This would be an examiner's amendment issued by the  
11 trademark examiner. She had had a conversation with  
12 Mr. Kamran either by e-mail or over the phone and would issue  
13 this as a matter of course as a follow-up to confirm in  
14 writing that the changes be made to the application.

15 Q And this is printed from the USPTO website?

16 A That is correct.

17 Q After the goods and services were amended, what happened  
18 next with regard to the application?

19 A Shortly thereafter, the application was approved by the  
20 trademark examiner and published for opposition in the U.S.  
21 Patent and Trademark Office official gazette.

22 Q I would like you to look at Warner Bros. Exhibit T. What  
23 is that?

24 A This would be the Notice of Publication issued by the  
25 trademark office reflecting what I have just told you.

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1 Q Now looking again at the trademark registration  
2 application --

3 A What exhibit was that please?

4 Q That is Exhibit G.

5 A Thank you.

6 THE COURT: I wasn't trying to make you talk faster.  
7 You don't need to talk faster. You are going plenty fast.

8 Q (By Mr. Sperling) Do you have that in front of you?

9 A I do.

10 Q What are the goods and services that are covered by the  
11 published trademark application?

12 A It is a wide range of goods and services, but to give  
13 their general categories, it is things like perfume, vitamins,  
14 children's toys -- there is a face mask in that category --  
15 gym bags, different types of food products including ice,  
16 sports drinks, wearing apparel clothing, other types of toys,  
17 things that would be used in performing a sport. There is  
18 also some services such as appearances by sport celebrities at  
19 conventions and things like that, and there is some other  
20 categories as well.

21 Q Is there any requirement or restriction that the design  
22 be used on Mr. Tyson's face?

23 A No.

24 Q So it could be used in a wide variety of commercial  
25 products?

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1 A Yes.

2 Q So after you filed the application, did you have any  
3 contact with anyone representing Mr. Whitmill?

4 A Yes, I did.

5 Q Would you describe that?

6 A Sure. On the date that the suit that we're here about  
7 was filed, I received a phone call at Mr. Kamran's office from  
8 Mr. Geoff Gerber.

9 Q Can you describe the contents of that conversation?

10 A Sure. Mr. Gerber was calling us to alert us that there  
11 had recently been a lawsuit filed, that Mike Tyson's name was  
12 associated with that lawsuit, however, that Mr. Tyson was not  
13 named as a defendant, a plaintiff, he wasn't named at all in  
14 the lawsuit, that we should let Mr. Tyson know that, and to  
15 please convey a message from Mr. Whitmill that there was no  
16 interest in interfering with Mike or his ability to use the  
17 face tattoo.

18 Q And has there, in fact, been any opposition?

19 A There has been none.

20 MR. SPERLING: No further questions, Your Honor.

21 THE COURT: Cross examination?

22 MR. SALSICH: No questions, Your Honor.

23 THE COURT: All right. You may step down.

24 MR. SPERLING: Your Honor, may we have a five-minute  
25 break. We will confer with plaintiff's counsel to see if we

1 can stipulate.

2 THE COURT: Okay.

3 MS. HEMERYCK: Even before that, I just want to move  
4 the admission of the exhibits that were used with Ms. Kroll  
5 that she testified about.

6 THE COURT: So the exhibits that you have used with  
7 Ms. Kroll are received into evidence.

8 MR. SPERLING: And, Your Honor, we would also move  
9 the admission of the exhibits addressed with Mr. Wheeler.

10 THE COURT: Okay. So all the exhibits that have been  
11 used in defendant's case will be received into evidence at  
12 this time. We'll take a five-minute recess.

13 **(Court Recessed from 4:45 p.m. until 4:50 p.m.)**

14 THE COURT: Ms. Hemeryck, are you ready?

15 MS. HEMERYCK: Yes, Your Honor. And we're going to  
16 call Michelle Schultz who will be very short because I'd like  
17 to read the stipulation that the parties agreed to into the  
18 record.

19 THE COURT: Okay. That sounds fine.

20 MS. HEMERYCK: So the parties have stipulated that  
21 Warner Bros. Exhibits B, C, D, E, L, M, N, and O are images  
22 that Warner Bros. found on the internet, and they are  
23 admitted; is that correct:

24 MR. SALSICH: Yes, we have no objection to that.

25 MS. HEMERYCK: So we move for the admission of those

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1 exhibits. Some of them are already in, Your Honor, but we  
2 didn't have the background.

3 THE COURT: So those are received into evidence then.

4 MS. HEMERYCK: Thank you. The parties also stipulate  
5 to Warner Bros. Exhibits P and Q, which are Mike Tyson's  
6 employment agreements for HANGOVER 1 and HANGOVER 2, and we  
7 move the admission of those as well.

8 THE COURT: All right. And without objection, those  
9 are received as well.

10 MS. HEMERYCK: So I will call Ms. Schultz. Again,  
11 her testimony will probably take five minutes.

12 THE COURT: Okay. Ms. Schultz, please step right  
13 over here to be sworn.

14 MICHELLE SCHULTZ,  
15 **Having Been First Duly Sworn, Was Examined and Testified As**  
16 **Follows:**

17 DIRECT EXAMINATION

18 BY MR. SPERLING:

19 Q Ms. Schultz, what is your profession?

20 A I am an attorney for Warner Bros.

21 Q And what is your title?

22 A Vice president and senior litigation counsel.

23 Q And how long have you been with Warner Bros.?

24 A Since 2007.

25 Q Ms. Schultz, are you familiar with something called

1 Tyson's Main Event?

2 A I am.

3 Q What is that?

4 A Tyson's Main Event is an app that is available online.  
5 You can download it onto an iPhone or an iPad, and it is a  
6 game that features a Mike Tyson cartoon character that you  
7 fight.

8 Q And did you download that Mike Tyson's Main Event to your  
9 iPad?

10 A Yes.

11 Q And have you played the game?

12 A Yes.

13 Q Does the Main Event app make any use apart from Mike  
14 Tyson's face or the image of Mike Tyson's tattoo?

15 A Yes, it does in two ways. One is Mike Tyson is an  
16 animated character, and there is a tattoo on his face. Also,  
17 there is a separate section of the app where you can purchase  
18 it's called Power Punch, and the icon for the Power Punch is  
19 Mike Tyson's tattoo. So you can purchase that, and then when  
20 you are playing the game, if you press on the icon, it gives  
21 you super power.

22 MS. HEMERYCK: And, Your Honor, we actually have an  
23 iPad with the game loaded on it if the Court would like to see  
24 that?

25 THE COURT: I think I understand what it is. I don't

1 think I need to.

2 MS. HEMERYCK: No further questions.

3 THE COURT: Okay. Cross examination.

4 CROSS EXAMINATION

5 BY MR. SALSICH:

6 Q Ms. Schultz, the third party uses of the Tyson tattoo  
7 that are embodied in Exhibits B, C, D, E, L, M, N, and O,  
8 would you agree that all of those uses refer to Mike Tyson as  
9 Mike Tyson in some way?

10 A I actually don't have the exhibits.

11 THE COURT: Is this something I can tell by looking  
12 at them?

13 MR. SALSICH: Yes, you can, Your Honor.

14 THE COURT: So I don't need to know what she thinks.

15 MR. SALSICH: That is true.

16 Q (By Mr. Salsich) Let me ask you, Ms. Schultz, how long  
17 did you search for those images?

18 A I actually didn't. I asked our legal assistant to look.

19 Q Do you know how long she spent looking for it -- or he?

20 A No.

21 Q Okay.

22 A It's a she.

23 Q The Mike Tyson employment agreements that are Exhibits P  
24 and Q, do you -- do you have those in front of you?

25 A I do.

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1 Q If you would turn to in Exhibit P paragraph 6(e). I  
2 believe it is on page 7.

3 A I'm sorry, 6(e)?

4 Q Yes, paragraph 6, subparagraph E.

5 A I actually don't --

6 Q On page 7.

7 A Oh, I see it.

8 Q You see it says Name and Likeness?

9 A Yes.

10 Q In that paragraph, is it fair to say that Mr. Tyson  
11 grants to the producer the right to use his name, voice, and  
12 likeness in various connections with the first HANGOVER movie?

13 A Yes.

14 Q Does that paragraph say anything about licensing any  
15 copyrights that he would have?

16 A That paragraph by itself?

17 Q Yes.

18 A No.

19 Q Are you aware of whether there is any reference to any  
20 copyrights granted by Mr. Tyson anywhere in Exhibit P?

21 A I actually haven't read Exhibit P.

22 Q Well, I represent to you that there are none and feel  
23 free to read it if you would like to.

24 THE COURT: What is the question?

25 MR. SALSICH: There are no references to any



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1 assignment of any copyrights by Mr. Tyson anywhere in his  
2 employment agreement in the first HANGOVER movie.

3 THE COURT: You just told us that. You just made  
4 that representation and now you are asking her to verify?

5 MR. SALSICH: I just asked if she had any reason to  
6 disagree with me, Your Honor. I apologize.

7 THE COURT: Do you have any reason to disagree with  
8 that?

9 THE WITNESS: I don't. But as I said, I didn't read  
10 the contract.

11 MR. SALSICH: Those agreements are already admitted  
12 into evidence, and the Court can take notice of what's in  
13 those agreements.

14 THE COURT: Thank you.

15 MR. SALSICH: That is all I have. No further  
16 questions.

17 THE COURT: Any redirect?

18 MS. HEMERYCK: No, Your Honor.

19 THE COURT: You may step down. Thank you. That was  
20 fast. Okay. Other witnesses?

21 MS. HEMERYCK: Our last witness is David Nimmer.

22 THE COURT: So why don't you step up to the lectern  
23 and just tell me why shouldn't he just enter an appearance and  
24 make the argument because isn't it legal argument?

25 MS. HEMERYCK: Your Honor, in this particular

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1 circumstance, I think it is entirely appropriate. It is, of  
2 course, up to the Court's discretion. The Court has  
3 discretion to hear Professor Nimmer's testimony if the Court  
4 thinks it would be helpful. There is no jury here. This is  
5 an obscure and complex legal issue, very novel. There is no  
6 case law out there on this. As the Court knows, Courts do  
7 hear expert testimony on obscure and complex legal issues in  
8 other contexts; for example, foreign law. In fact, there is a  
9 federal rule, Federal Rule 44.1, that codified the preexisting  
10 practice of allowing experts, legal experts, on what foreign  
11 law provides. And again, it's purely discretionary to the  
12 judge in that case if it is going to be helpful to the judge.  
13 The same thing with patent law. Patent law is considered  
14 complex, a lot aren't familiar with it, and, therefore, judges  
15 will hear expert testimony on what patent law provides. Here  
16 we have got no jury, so you don't have to be concerned with  
17 the issue that is raised with the jury being overly influenced  
18 by an expert or being confused about whether the expert or the  
19 judge is the one stating the law. In fact, all the cases that  
20 were cited by the plaintiff in their opposition are cases  
21 involving jury trials. There is no jury here. The question  
22 is, will Professor Nimmer's testimony about this very obscure  
23 and novel issue of copyright law on which he is clearly an  
24 expert be helpful to the Court. We submit that it clearly  
25 would be and we think the Court should hear it.

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1 THE COURT: I'm not going to. I am going to sustain  
2 the motion in limine. I think it is just legal argument, and  
3 I would be much more interested in hearing arguments from the  
4 counsel in the case as to this case. So that is really what I  
5 would rather spend time doing. So we talked about you all  
6 giving me some arguments; correct? Are you ready to do that?

7 MR. SPERLING: Do you want to hear argument today,  
8 Your Honor?

9 THE COURT: Uh-huh. Didn't we talk about that?

10 MR. KAHN: Yes.

11 MR. SPERLING: I didn't understand the Court was  
12 going to hear argument today, but if we could have five  
13 minutes, we are prepared to argue.

14 THE COURT: Yeah, I think it will be -- yeah, okay,  
15 five minutes.

16 MR. SPERLING: We have this reply brief that we  
17 received as you did, so we haven't had a chance to fully  
18 digest it.

19 THE COURT: Look, my questions -- I know this case  
20 is, you know, an area of law that is novel and complex. I  
21 don't think it is all that novel and complex frankly. I have  
22 a few questions, so I am going to take five minutes, and then  
23 I would like for you each to give me no more than 15 minutes  
24 worth of argument, less than that if possible, and try to  
25 answer the questions I have, and then we can come back in the

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1 morning after I have had more time to study it, come back in  
2 the morning at 9, and my intention would be to give you my  
3 rulings at 9. If I have any further questions, I would ask  
4 them then, which it's possible I would because as I said, I  
5 haven't actually read this, but I read some of it while I was  
6 watching your movie.

7 MR. KAHN: I hope it was his part, Your Honor.

8 THE COURT: No. It was your part, Mr. Kahn.

9 MR. SPERLING: We appreciate that, and we very much  
10 appreciate the Court's intention to rule promptly.

11 THE COURT: Yeah, I mean, that seems to be more  
12 important, so five-minute recess.

13 **(Court Recessed from 5:00 p.m. until 5:05 p.m.)**

14 THE COURT: Okay. Are you all ready?

15 MR. SPERLING: Yes.

16 THE COURT: Mr. Kahn.

17 MR. KAHN: Thank you, Your Honor.

18 THE COURT: So here's the questions I have for you.  
19 I need you to tell me about, well, three things really,  
20 irreparable harm, this issue of posting of bond, and how you  
21 think that the name of the Mike Tyson trademark stuff  
22 including the fact that he could use the tattoo without his  
23 face behind it affects your case. Those are the three  
24 questions I have. You can put them in whatever order that you  
25 want.

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1 MR. KAHN: Okay. First it was irreparable harm, it<sup>61</sup>  
2 was the trademark at the end, and the middle was the bond?

3 THE COURT: Right.

4 MR. KAHN: Okay. Let me address the first and the  
5 third. Mr. Gerber can quickly address the second and then we  
6 will be done. The irreparable harm here, Your Honor, when  
7 Mr. Sperling was making his argument about group defamation  
8 and loss of control and all the rest, this is not a group  
9 defamation claim. The irreparable harm is that this is a work  
10 of art that my client created, owns the copyright of, and this  
11 is what he has lost control of. He has lost the control which  
12 the copyright law gives to him to be able to control what kind  
13 of uses, what derivative uses, what other types of uses, are  
14 allowed to be made with his art, and that is why the Courts  
15 consistently found, including cases both against and by Warner  
16 Bros., that infringement of copyright is a special area where  
17 part of it is control. That's his irreparable harm. As he  
18 testified about having lost the battle, it's not that he's  
19 simply been associated with a slimy tattoo artist in the film  
20 that he might find offensive, it is that he was never given  
21 the opportunity. Nobody came to him and said, Here, we'd like  
22 to use your tattoo in this and give him the opportunity to say  
23 no, use a different tattoo, I don't want to be associated with  
24 this film. That's the harm to Mr. Whitmill.

25 As far as the trademark goes, Your Honor,

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1 Mr. Whitmill earlier testified -- and this picture is probably  
2 the best example of it -- that he doesn't object to any  
3 appearance by Mr. Tyson that is connected -- where this tattoo  
4 is connected to Mr. Tyson. So the problem -- there is no  
5 issue for him in this online boxing game or in the movie Rocky  
6 whatever it was 4 or 5 where Mr. Tyson appears as Mr. Tyson.  
7 Those are not issues. As far as -- and as we pointed out in  
8 our brief, trademark and copyright are really two separate  
9 areas of the law, and if you have a trademark, that isn't a  
10 defense against a claim of copyright infringement; if you have  
11 a copyright, it is not a defense of a claim of trademark  
12 infringement. In this particular area with this application,  
13 at least based on our initial review which is the conversation  
14 Mr. Gerber had with Mr. Tyson's lawyer, it is our  
15 understanding -- which may not be the case, and the time for  
16 filing an objection to this trademark application hasn't  
17 expired -- it was our understanding that everything having to  
18 do with this trademark registration would be directly  
19 connected to Mr. Tyson.

20 THE COURT: Right. So you are making a distinction.  
21 You are not saying it has to be on his face. You are saying  
22 as long as it's directly connected to him, there is --

23 MR. KAHN: At least in the trademark context, Your  
24 Honor.

25 THE COURT: Right. Okay.

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1 MR. KAHN: So that if it's Mike Tyson boxing gloves  
2 and there is a tattoo -- I don't want to speak for my  
3 client -- but there is a tattoo on the boxing glove or some  
4 other sports equipment, if it is connected to him, my client  
5 can live with that under the trademark law, and it doesn't  
6 have any bearing on his other copyright interests, including  
7 the rights to control derivative works and reproduction.

8 And as far as the bond, my client doesn't have  
9 the xxxx xxxxxxxx, but I do want Mr. Gerber because he is the  
10 one --

11 THE COURT: And I didn't -- I mean, if you wanted to  
12 say anything else, these are the questions I had for you. I  
13 mean, I told you you can have a few more minutes, and you may  
14 if you wish to, but you don't have to.

15 MR. KAHN: You know, Judge, we think at least under  
16 the likelihood of success on the merits of the copyright  
17 claim, we believe and we have tried to express it in our reply  
18 brief that it is a clear case. It is not even a close case.  
19 The fair use argument I think is a complete mick-wig  
20 (phonetically). Any tattoo, any tattoo, any tribal type  
21 tattoo on the face of that actor the next morning other than  
22 the one connected to Mr. Tyson which apparently from the test  
23 marketing they decided would be a great way to promote the  
24 movie, any tattoo would work. The movie wouldn't have been  
25 affected one bit. Even that line with Mr. Tyson telling the

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1 character to get that tattoo off his face, there is no parody  
2 here. If you look at the marketing, if you look at the  
3 promotional tie-ins, this is not a fair use. This is an  
4 infringement. But I will let Mr. Gerber speak.

5 THE COURT: Okay. Mr. Gerber.

6 MR. GERBER: With respect to the bond, I am not sure  
7 exactly what --

8 THE COURT: Well, the question is, you know, wouldn't  
9 I be required if I enjoined this lawsuit to require your  
10 client to post a bond and wouldn't it have to be a bond that  
11 would be most likely in excess of anything he would be able to  
12 post because of the losses that the defendants have argued  
13 about?

14 MR. GERBER: Well, I think there is case law to  
15 support and has in this circuit, Courts have required in  
16 copyright infringement cases no bond or a nominal bond. You  
17 know, I don't want to argue against my client's position. I  
18 don't think that is the better case law. I think that Judge  
19 Bennett's well-reasoned and thoughtful decision, collecting  
20 almost every bond case in the circuit in -- was it Curtis  
21 1000?

22 THE COURT: Is that in your brief?

23 MR. GERBER: It's in the brief. You can go to the  
24 last page. I think that that is a well-reasoned decision, and  
25 Judge Bennett came out -- I will say that at the same time, he



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1 had another case. He came out on the side that a bond is  
2 required. At the same time, he had -- or within a month or  
3 two, he had another pending case -- I didn't cite it -- where  
4 he does cite it in the Curtis 1000 case where he didn't  
5 require a bond, but the facts are so unique to that case that  
6 I think that they are inapplicable, and I think his reasoning  
7 is sound that the modern trend and despite what Eighth Circuit  
8 cases are out there -- I have cited them because it does give  
9 you discretion -- is that some bond is usually required these  
10 days. The Eighth Circuit has not reversed any preliminary  
11 injunction because no bond was required. That said, there are  
12 copyright cases that will allow -- in the Eighth Circuit that  
13 will allow for the posting of a nominal bond, and I have cited  
14 a couple of those cases here.

15           And I have read a ton of these cases. What I think  
16 it comes down to is that the district court has a tremendous  
17 amount of discretion in setting the bond. And in balancing  
18 the equitable factors in setting the bond, the Courts look to  
19 the strength of the likelihood of success on the merits, and  
20 they look at this balancing of undue hardships, and they are  
21 going to take a strong look at what is the real harm to the  
22 defendant, typically the party opposing the bond -- or  
23 opposing the preliminary injunction. They are going to look  
24 to see which of the damages are attributable to the continuing  
25 infringement. You know, and Warner Bros. has come out in

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1 other cases where they have sought injunctions in copyright  
2 cases -- and I have cited those in the brief -- where they  
3 successfully argued that you cannot count infringing activity,  
4 you cannot count wrongful conduct when you look to what those  
5 damages are. So after April 29th, you know, they continued to  
6 rack up costs and expenses, and they spent a tremendous amount  
7 of money, and all of that after they were served with this  
8 complaint knowing that they were accused of copyright  
9 infringement, knowing the preliminary injunction. They didn't  
10 warn the movie theaters. You know, they didn't say, hey, we  
11 may be enjoined here. They went full steam ahead. And it is  
12 a pattern of practice where they are an enormous company.

13 This is the most highly anticipated R-rated comedy of  
14 all time, and it is just too big to stop. And I hate to be  
15 here where there's one set of copyright laws and remedies for  
16 a multi billion dollar corporation when they go after the  
17 company that is going to turn out the infringing Harry Potter  
18 lexicon and another set of copyright laws and remedies that  
19 are available to a tattoo artist in Waynesville. Those  
20 remedies should be available to all, and you have to balance  
21 the equities in doing that. I think that is really what all  
22 the case law says is that the judge has a tremendous amount of  
23 discretion. And we cited the cases. Warner Bros. has been  
24 through this before. I will hand over -- I have got them over  
25 here. I will make sure the clerk has them. I have got the

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1 docket sheet from Pacer for the Hart versus Warner Bros. case  
2 where the Court in the Eastern District of Virginia required a  
3 100,000-dollar bond for a preliminary injunction after the  
4 release of The Devil's Advocate, and we have cited that, but I  
5 don't have the opinion. It is not available on Pacer. I have  
6 got a copy of the district court's preliminary injunction  
7 order enjoining Warner Bros. from releasing the Dukes of  
8 Hazzard film, and they required a \$5 million bond in that  
9 case, but the plaintiff in that case had been on and off in  
10 litigation with Warner Bros. for years and was a corporate  
11 entity that could bring substantial resources to bear, not  
12 anything on the scale of Warner Bros. But there are very,  
13 very few cases out there where I could find bonds of this type  
14 because the cases just really don't go there. We tried to  
15 cite everything on point that we could in this reply brief.

16 THE COURT: Right. And as I said, I haven't had time  
17 to study your reply belief in great detail, but I will look at  
18 those cases, so thank you.

19 MR. GERBER: Thank you.

20 MR. SPERLING: Judge, I'd like, if I may, to respond  
21 to points raised in the reply brief that we haven't had a  
22 chance to address before, and there were two critical  
23 statements that were made by the plaintiff's counsel that I  
24 think are very important to this case that I would like to  
25 address.

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1 THE COURT: Okay. Go ahead.

2 MR. SPERLING: So, Judge, let me briefly respond on  
3 the four critical merits issues that don't have to be decided  
4 by the Court but that I think either is clear that we are  
5 likely to prevail on or that are at least very serious issues.  
6 Let me talk for a moment about the implied license. Now by  
7 its nature, an implied license is not written, and it wasn't  
8 communicated orally. This is an implied to the fact license.  
9 In the reply, they treat it as if it were implied to the law  
10 license. It's implied to the fact by the conduct of the  
11 parties. And the question is --

12 THE COURT: Let me ask you this. Your brief filed on  
13 Friday seemed to put most of its eggs in the basket that they  
14 are trying to copyright Mike Tyson's head or face. I mean,  
15 you spent a lot of time arguing that, and I don't see that as  
16 their argument, so I don't know if that's where your implied  
17 license is going or not.

18 MR. SPERLING: No. That is a completely different  
19 argument. That has to do with copyrightability, and I will  
20 address that very briefly, but that is not this point at all.  
21 The point here is, they admit that there is an implied  
22 license, so now the question is what is the scope of the  
23 implied license. That is what the Court ultimately will have  
24 to determine because it is not written down and it wasn't  
25 expressed in a conversation between Mr. Whitmill and

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1 Mr. Tyson. So how do you find the scope? You find the scope  
2 by the conduct of the parties. What do we see? We see that  
3 eight years ago, as we heard from Mr. Whitmill today,  
4 Mr. Tyson's wife spoke to him about filing a trademark  
5 application. No objection; apparent acquiescence in that.

6 THE COURT: His sister. Isn't that what he said?

7 MR. SPERLING: I apologize, his sister.

8 THE COURT: Okay. Go ahead. I just wanted you all  
9 to know that I was listening.

10 MR. SPERLING: Better than me apparently. So at the  
11 very inception, Mr. Whitmill understood and had no objection  
12 to a trademark use which by its nature is not on Mr. Tyson's  
13 face. What did he say in his testimony? He said, "It's his  
14 likeness now, he can do with it what he wants," and what the  
15 plaintiff's counsel told you when he just argued in front of  
16 you is the harm is being associated -- he said it's got to be  
17 connected to Tyson. Well, it sure is connected to Tyson in  
18 this movie. He is in the movie again. He is in the same  
19 scene with Ed Helms with the tattoo on. He makes that  
20 critical comment in the movie which really is an important  
21 part of parody and satire, "You better get that tattoo off  
22 your face." He is intimately associated with the movie. He  
23 was very important in the first movie. He acted in the second  
24 movie. He never told anyone there was any concern about the  
25 use of the same tattoo he had on his face on the other actor's

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1 face. He acquiesced in it. What Mr. Whitmill told you when  
2 he testified earlier today was it's his likeness. Well, that  
3 is exactly what the Warner Bros. contract with Mike Tyson  
4 says, that they have the right to use his likeness.  
5 Mr. Whitmill defined it that way. That is exactly what they  
6 did. So that is the implied license.

7           The estoppel argument is equally important. So  
8 Mr. Whitmill put the design on Mike Tyson's face knowing he  
9 was famous, and then Mike Tyson appears in Rocky Balboa, a  
10 documentary Tyson, THE HANGOVER, ads for it. Not only no  
11 objection, but the trademark isn't registered. It isn't  
12 registered for eight years, and there is no notice whatsoever.  
13 Warner Bros. was entirely reasonable here. They had no reason  
14 to believe, nor did anyone, that anyone but Mike Tyson had a  
15 right to control the use of the design, and Mike Tyson had no  
16 reason to believe that either. Because the license is  
17 implied, no one, including Mike Tyson, had any reason to  
18 believe that anyone other than Mike Tyson had the right to  
19 control the use. And the trademark registration is critical  
20 for that. This is a case where the copyright and trademark  
21 are inseparable. It is the same design. We already see it is  
22 being used in applications independent of Mike Tyson's face,  
23 and Mr. Whitmill's lawyer tells Mr. Tyson's lawyer we are not  
24 going to interfere with it. They are not going to oppose the  
25 registration. They're not going to try to stop it. They are

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1 not going to interfere with it. Why is that important, Judge?  
2 Because it shows you based on his conduct what he understood  
3 the scope of the implied license to be. And that is what is  
4 consistent with how Mike Tyson acted in the movie with Warner  
5 Bros.

6 The issue about controlling Mr. Tyson's face is the  
7 copyrightability that Professor Nimmer addresses. No Court  
8 has ever held -- indeed it is a case of first impression --  
9 whether you can have a copyright on human flesh.

10 THE COURT: And you think that is what they are doing  
11 here? I mean, I didn't see the plaintiffs making that  
12 argument. I understand your argument.

13 MR. SPERLING: Well, they do because they claim a  
14 copyright, and it is a seriously contested issue in this  
15 instance particularly. Remember, he didn't do the initial  
16 design before. It is a different situation. If you create  
17 the design, you have a copyright in that design, then you put  
18 it on someone's face, that is a different issue. But that is  
19 not what happened here. He created the design in the first  
20 instance on the face, and the reason that is so important is  
21 under the copyright laws, you have a right to prevent the  
22 alteration or expression of the original, not copies, but the  
23 original. Well, the original is on Mr. Tyson's face. What  
24 that would mean is that he can't alter it, he can't remove it,  
25 he doesn't control his own face anymore. That is what it

1 would mean under the copyright laws if a design that is  
2 created in the first instance on his face has copyright  
3 protection as opposed to a sketch that is created separately.

4 And then finally, the parody point. Now the Supreme  
5 Court in Acuff-Rose is extraordinarily clear on this. If  
6 there is a colorable claim for fair of use, no injunction  
7 should issue. This is far more than a colorable claim. I  
8 think when the Court looks at the reply, they --

9 THE COURT: Explain that to me. Explain what is the  
10 parody here.

11 MR. SPERLING: Well, sure. You have got this  
12 powerful figure, Mike Tyson, in the original film with the  
13 tattoo on his face. What does he do? He knocks someone out  
14 when he is angry at them. He is the epitome of male  
15 aggression. Instead, now you have this milk toast character  
16 with the same tattoo on his face. It's a real spoof on men  
17 and their misadventures.

18 THE COURT: Yeah, I get that. I thought you had to  
19 have something that was parodying or commenting on the actual  
20 copyrighted thing. They are not saying they have got a  
21 copyright on men and their stupid behavior, and so how is this  
22 a parody with regard to the tattoo?

23 MR. SPERLING: Well, it is a parody about the  
24 powerful tattoo on Mike Tyson's face which shows up on this  
25 milk toast's face and then you have the interaction between



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1 Tyson and the character himself. Now I realize that matters  
2 of art and comedy are in the eye of the beholder, but the  
3 tracking shows people find this very funny, very compelling,  
4 and the Supreme Court's made it clear if there is even a  
5 colorful claim, you don't enjoin it because rights of  
6 expression are throughout our history protected. It is not a  
7 minor point. It is an important point.

8 Judge, turning from those issues, and I want to save  
9 a moment for Ms. Hemeryck to address the bond issue, which is  
10 a significant issue also, there is no irreparable harm. There  
11 is no question that if the case proceeds and if the plaintiff  
12 were to prevail on the merits, he can recover money damages,  
13 and there is no question that Warner Bros. can pay those money  
14 damages. Now the plaintiff doesn't even respond in their  
15 brief to one of the two key Supreme Court cases on this point.  
16 They ignore it altogether. In the Winter case, Your Honor,  
17 the Supreme Court was absolutely clear. In order to issue an  
18 injunction, the plaintiff bears the burden of establishing all  
19 elements including irreparable harm, so there is no  
20 presumption. But even if there were, it's been rebutted here.  
21 It is clear that this is the kind of case where damages can be  
22 computed. It is a percentage of profits based on the  
23 contribution that the alleged copyright infringement of the  
24 alleged copyright contributed, and there is no question --

25 THE COURT: What about the argument that it is the

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1 loss of control or the ability to control?

2 MR. SPERLING: So what that argument really is is a  
3 way of smuggling back in an irrebuttable presumption after  
4 all, because if that were the case, you would have an  
5 injunction in every case of copyright infringement. And that  
6 is what the Supreme Court said you can't have. They said they  
7 have got to prove their burden. And even if there were a  
8 presumption any longer in the Eighth Circuit, which we think  
9 it is clear there isn't after the Winter case, we have  
10 rebutted that. This is clearly a case where damages can be  
11 computed. This is clearly a case where the defendant can pay  
12 the damages. So the loss of control argument if it were  
13 accepted overrides the Supreme Court precedent and makes an  
14 injunction mandatory in every case of copyright infringement.

15 There is also the balance of harms which is a very  
16 significant issue here. It's all out there, Judge. For  
17 whatever reason, for whatever reason, the plaintiff chose not  
18 to seek the temporary restraining order. In essence, their  
19 argument today is that Warner Bros. should have self-enjoined.  
20 They should have shut down the process they were engaged in  
21 even though we submit, Your Honor, they were quite reasonable  
22 based on Mr. Tyson's conduct with them and based on  
23 Mr. Whitmill's lack of conduct to believe they were acting  
24 appropriately. The plaintiff when he discovered this could  
25 himself or through his lawyers have contacted Warner Bros. We

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1 know that one of his lawyers had been prior counsel for Warner  
2 Bros. for three years. They knew who to contact. They could  
3 have tried to head this off, but instead they waited. They  
4 waited a few weeks. They did a copyright registration. They  
5 waited a few more weeks. They filed a complaint. They didn't  
6 seek a TRO, and now they say, Oh, my God, Warner Bros. has  
7 gone forward instead of cutting its own throat. You are not  
8 required to cut your own throat. That would be a bad rule.  
9 You wouldn't need a Court order at that point. They had  
10 alternatives. There was so many ways this harm could have  
11 been prevented. For whatever reason, they chose not to  
12 address any of them.

13           Your Honor, the balance of harms here, the harms to  
14 Warner Bros. is extraordinary. In the argument, you hear the  
15 rules should be the same for everyone. The rules should be  
16 the same for everyone. You shouldn't be allowed to sit on  
17 your rights and let someone justifiably believe they are  
18 engaging in proper conduct, not warn them when you could have  
19 done so, and then swoop in and try to leverage huge money out  
20 of them. And let me be clear about this. I am sure the Court  
21 appreciates what this is about. If the Court were to enter an  
22 injunction, it is an enormous leverage to try to extract tens  
23 of millions of dollars. That's what it is. It's a final  
24 decision for all practical purposes where there's been  
25 discovery before these important legal issues have been

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1 addressed. There is no reason to do that here. There is an  
2 adequate remedy of law, and there is a defendant who can pay  
3 if the need were ever to arise. I would like to let Ms.  
4 Hemeryck briefly address the bond issue.

5 THE COURT: Ms. Hemeryck.

6 MS. HEMERYCK: And I will be very brief, Your Honor.  
7 As Mr. Sperling just pointed out, plaintiff's counsel in  
8 arguing against a bond here argued that the same remedy should  
9 be available to all parties, and Mr. Sperling pointed out of  
10 course that is true. And the fact is that damages are equally  
11 doubled. The remedy of damages is an adequate remedy here  
12 that Warner Bros. can pay and is certainly available here to  
13 the plaintiff. Furthermore, there is no legal entitlement to  
14 a preliminary injunction. As the Supreme Court made clear in  
15 Winter, a preliminary injunction is an extraordinary remedy  
16 never granted as a right, so there is no entitlement to a  
17 preliminary injunction.

18 The cases that plaintiff cites in support of the  
19 argument that there should be only a minimal bond here simply  
20 are not on point. In every one of those cases, and I am sure  
21 Your Honor will look at them, but in every one of them, the  
22 Court either found an absence of substantial harm to defendant  
23 or that the harm to defendant was minimal, or that the harm  
24 was very remote, or that the plaintiff would be capable of  
25 compensating the defendant for any damages it sustained in the

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1 event of an injunction. There is not a single case they have  
2 cited where you have got a situation like this where the  
3 defendant in the event of an improperly granted injunction is  
4 going to suffer hundreds of millions of dollars of damage that  
5 plaintiff can't possibly compensate for. Thank you.

6 THE COURT: Mr. Kahn.

7 MR. KAHN: Just two quick points, Your Honor. One is  
8 that Warner Bros. continues not to get it. We are seeking  
9 both a preliminary injunction an a permanent injunction, and  
10 regardless of the Court's order tomorrow, we are hoping it  
11 will be a preliminary injunction, our plan is to go forward  
12 one way or the other to ask the Court to bifurcate this and  
13 schedule an early hearing on a permanent injunction. We can  
14 worry about damages if any after that. So this is an  
15 important form of relief. Mr. Sperling tries to create the  
16 impression that we've been sitting on our rights -- or my  
17 client had been sitting on his rights since he fist learned  
18 about this in early April. He makes a big deal about the fact  
19 that he went ahead and filed a copyright registration. He may  
20 not be aware, but you can't file a lawsuit without a copyright  
21 registration or at least going on file, so that needed to be  
22 done in order to bring a file for copyright infringement. And  
23 one of the reasons there was not a TRO, Your Honor, as this  
24 Court will recall, was that early on, one of Mr. Sperling on  
25 behalf of his client first threats was to file a motion to

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1 disqualify us. In fact, his first proposal was if you don't  
2 withdraw your motion for a preliminary injunction, we will  
3 file a motion to disqualify you. So from that point on, Your  
4 Honor, things slowed up. If you recall, that is when the  
5 Court had the status conference. You set a time for the  
6 filing of the motion to disqualify. We brought it in and had  
7 you notify Mr. Sperling the Dowd Bennett firm in case we were  
8 disqualified. So there are reasons why this case has moved at  
9 the pace it has moved. It is not that we've been sitting back  
10 trying to, you know, do something here. We are prepared to go  
11 forward on both the permanent injunction and the preliminary  
12 injunction, and it's not simply a matter about money.

13 MR. SPERLING: One point in response, Your Honor.

14 THE COURT: You may.

15 MR. SPERLING: So the Court will note, Your Honor,  
16 that when the complaint was filed, the motion for preliminary  
17 injunction was filed, there was no motion for a temporary  
18 restraining order. Moreover, the Court will recall during the  
19 first telephone conference of this case, there was no  
20 discussion about seeking a temporary restraining order. It  
21 had nothing to do with any of the other matters that were  
22 going on in the case.

23 THE COURT: All right. Well, here's what I am going  
24 to do. I am going to go re-read all this stuff and consider  
25 your arguments and your evidence, and I would like you all to

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1 be here at 9 or someone to be here at 9:00 a.m. You don't all<sup>79</sup>  
2 have to be here. I need one lawyer from each said. That is  
3 all that is required to be here. And at 9:00 a.m. tomorrow, I  
4 will I believe give you my opinion then. If I have questions  
5 raised by some of the things tonight, I will ask for further  
6 clarification. I am hoping that won't happen. But I can tell  
7 you my decision in the morning. And even if I have questions,  
8 I will still try to tell you my decision tomorrow because  
9 obviously, this is an issue where time is important. Okay.  
10 So thank you both sides, and this matter will be in recess  
11 until 9:00 a.m. tomorrow morning.

12 (PROCEEDINGS CONCLUDED AT 5:35 P.M.)  
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CERTIFICATE

I, Angela K. Daley, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 79 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 24th day of May, 2011.

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/S/Angela K. Daley  
Angela K. Daley, CSR, RMR, FCRR, CRR  
Official Court Reporter